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Supreme Court of the United States

OCTOBER TERM, 1945

No. 44.

THE UNITED STATES, Petitioner, vs.

against

ARTHUR LYNAH ET AL., Defendants et Petitioners.

No. 52.

THE UNITED STATES, Petitioner, vs.

against

CHARLES A. WILLIAMS AND ADELIA [illegible]
Defendants et Petitioners.

[illegible]

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,

against

ARTHUR LYNAH ET AL., DEFENDANTS IN ERROR.

No. 59.

THE UNITED STATES, PLAINTIFF IN ERROR,

against

CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS,
DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

AUTHORITIES THAT THE SERVITUDE OR EASEMENT CLAIMED BY THE GOVERNMENT MUST BE SPECIALLY PLEADED AND CANNOT BE SET UP HERE FOR FIRST TIME IN THIS COURT.

In our main briefs (Lynah case, p. 44; Williams case, p. 36) we took the position that the answer of the United States,

defendant in these cases, did not assert any title in themselves, did not set up any easement or servitude (see answer, p. 6; transcript of Williams case, p. —), and that therefore such easement or servitude, which is an affirmative defense, could not be availed of as a defense. Moreover, that it does not appear from the record that such easement or servitude was made the subject of a request, as a conclusion of law, to the court below, and the ninth assignment of error raises the question for the first time in this court on the ground that the court below only failed to hold such easement, but it does not appear that the court below was ever requested so to hold. In this state of the record the question cannot be made here.

"An *excuse* of the trespass and a *justification* in respect of any *easement* or incorporeal right, a right of way either *public* or private, and whether by grant, prescription, custom or necessity, must always be *specially pleaded*."

1 Chitty on Pl., p. 541.

"This was an action for trespass; the defendants offered in excuse of the trespass, which had been proved, evidence of the existence and occupation by themselves of a private way in the *locus in quo* for twenty years, etc. The court said: 'But whether the evidence offered would have been a good defense or not, we are all of the opinion that the defendants could not avail themselves of it, under the general issue, in this case, * * * and had no right to give evidence of such an easement, unless specially pleaded.'

Trout vs. Berry, 7 Mass., p. 385.

"It often occurs that one undertakes to justify acts which would otherwise be unlawful, as injuriously affecting another's possession, on the ground that he had a right to do so under and by virtue of a right of easement. And where to an action for such injury the defendant justifies in his plea, great particularity and precision are required in stat-

ing, for instance, the right of way under which defendant alleges a right to enter upon the close of the plaintiff."

Washburn's Easements and Servitudes, ch. VI, § 2, p. 16.

"The right to an easement as a defense to an action must be pleaded specially, and cannot be taken advantage of under the general issue."

Vol. III, Ency. of Pl. & Pr., p. 258.

"It seems to be an established rule of pleading that wherever the defendant in trespass *clausum fregit* justifies the trespass by reason of some title or easement, which gives him a legal right to do the act complained of, he must set forth his title or right to enjoy the easement especially, so that the plaintiff may have an opportunity of traversing it."

Pearle vs. Bridges, 2 Saund., 402, note 1.

"If defendant claims an easement, he must plead it specially, and cannot give it in evidence on the general issue."

Com. Dig. Pleader, sec. 15; *Hawkins vs. Wallis*, 2 Wils., 173.

"So an entry by authority of law without process, such as * * * or to abate a nuisance to a water-course, must be specially pleaded."

Chitty on Pleading, p. 541.

"A justification of the trespass in respect of any claim by custom, etc., to any way or other easement, or to any water-course, or to the use of any water, must be pleaded."

Same, p. 541.

Waters vs. Lilley, 4 Pick., 145.

"This was an action of trespass *quære clausum fregit*. The defendant offered evidence of a license from the plaintiff.

The evidence was objected to on the ground that a license must be specially pleaded and could not be given under the general issue. Objection was overruled, and verdict for defendant. Upon appeal the court said:

"In the case of *Bennett vs. Alcot* Mr. Justice Buller says: 'It is now perfectly clear that a license to enter cannot be given in evidence under the general issue, and if the law is perfectly clear we are under no obligation to give reason for it. The reason is obvious, however:

"'It is that the plaintiff shall not be surprised by a defense of which he had no notice and of which he could not be apprised by defendant's plea.'

"New trial granted."

Gambling vs. Prince, 2 Nott & McC. (So. Car.), 138.

It is clear, therefore, that having gone to trial on a question of title only, defendant cannot in appellate jurisdiction set up easement as a defense.

Again, in the *Pumpelly case* the defense of easement was specially pleaded in a distinct affirmative plea.

13 Wall., pp. 170, 171.

And in *Hill vs. United States*, 149 U. S., 593, "the United "States positively and precisely pleaded as to the land below "*low water* in Chesapeake bay, and that under the law, for "the purpose of a light-house, it has a paramount right to "its use as against plaintiff or any other person."

But in this case at bar there is no affirmative plea and no claim of title or easement in the United States in the answer.

And now, in this court, for the first time, is there any claim of an easement, and that only in an *undefined part* of this rice plantation, not pleaded as a defense.

It is a general rule that questions not made on the trial

or presented to the court below for decision cannot be entertained here.

Union Pac. R. R. *vs.* Myers, 115 U. S., 1.
Lloyd *vs.* Preston, 146 U. S., 630.
Montana R. Co. *vs.* Warren, 137 U. S., 348.

DIFFERENCE BETWEEN TIDAL AND NAVIGABLE WATERS.

The continuous fallacy and misapprehension running through the argument of counsel for the Government and all his briefs in this case is the failure to distinguish between tidal and navigable waters in South Carolina. We have previously shown in our briefs that the rule in South Carolina is to grant salt marsh lands, which are lands covered on high tide once a day by tidal but not *navigable* waters; that tide swamp was granted, and the most valuable land in the history of the State; that the limit of private ownership, if the grant so extends, is to low-water mark, and that the trust in the State for navigation is in the channel, or "beds proper," of navigable streams which are not grantable, of course, to settlers under the land acts.

This principle and distinction is clearly enforced by the supreme court of South Carolina in the recent case of *Heyward vs. Farmers' Co.*, 42 So. Ca., 156–'7:

"If the plaintiff can trace the title back to a grant from the State to land covered by *tidal* though not *navigable waters*, the State would be estopped by its grant. The principle, however, is different when the land granted is covered by *navigable* waters, as shown by Mr. Justice McGowan in *State vs. Pacific Guano Co.*"

Now, *the portion* of this rice plantation that the court below finds is between mean high water and low water was never covered by *navigable* waters, but only by *tidal* waters; it was therefore never the subject of a trust for navigation.

This appears by the pleading, the complaint alleging the rice plantation, 420 acres, was *reclaimed*, as delineated by red lines on map annexed (fol. 3, p. 2, Transcript Lynah case). The map annexed, at page 12, is dated 1772, and the Savannah Back river is outside the red lines, within which is the rice plantation.

Again, by the original official survey and plat attached to original grant of Vernezobre plantation to Daniel Vernezobre in 1736, which shows the primal condition of the *locus in quo*, the Savannah Back river as a *navigable* stream is outside the limits of the property granted. (By comparison the plats of 1736 and 1772 are identical in this respect.) And the lines on both sides of the plantation on the plat annexed to the grant down to the Savannah Back river show the trees which mark the courses in that primal state of these premises to be bay, gum, and water oak on one side, and water oak, hickory, oak, and live oak on the other side, up to the navigable channel of the Savannah Back river, as shown on original map and survey, showing that down to the river in the primal state of nature a heavy timbered swamp originally extended, and these rice fields are the reclaimed swamp forest.

To say that in this swamp forest there was and is a trust for navigation in the sovereign because a part of it was below the ordinary high water and made it *tide* swamp—*i. e.*, covered by *tidal* water, but not by *navigable* water—is to ignore the leading principle in the law of the State of South Carolina, for it was on this principle her chief agriculture was founded and rice became her first staple. As the court below found: "The whole rice culture of South Carolina is founded on this system and the *policy* of the colony and the State has been to grant such lands for rice culture" (page 7, finding VI).

The policy of this original grant was for and on condition of settling, for building houses, for clearing for reclamation, for keeping herds of cattle, and it was "*in free and common*

socage," the most liberal of the English tenures, and it was for *valuable consideration* on a rent reserved. Moreover, it was certain in description, courses, distances, and area, and with plat and survey accurately located the navigable Savannah Back river that was the boundary now and then in the plat.

On such a grant and plat and survey this rice plantation was reclaimed, established at great cost and expense, as is obvious in order to reduce a swamp forest to the systematic and scientific culture of rice fields; and it was in pursuance of a governmental *policy*, in the first step of colonization and development of agriculture in the colony in the leading staple, rice, that this rice plantation was reclaimed and established; and so founded and the right vested, it is beyond the prerogative of government to destroy it or dispossess without compensation.

This court has just said:

"The status of real estate within a particular jurisdiction is not so much one of contract as of *policy*, which may be changed at any time by the legislature *provided no vested rights are disturbed*. Of course if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession good against the State they could only be dispossessed by proceedings in eminent domain."

Mobile Trans. Co. *vs.* City of Mobile, Oct. term, 1902; decided 5 Jan., 1902.

The *policy* of the State of South Carolina and the Crown and colony for one hundred and seventy years and more has been to grant these lands for rice culture, and the whole history and development of the agriculture of that colony shows this system of rice culture to be her chief and richest agriculture, and the grant of such rice lands in part covered by *tidal* but not *navigable* waters, by the latest utterance of the supreme court of South Carolina, estops the State, and in the latest utterance of this court the plaintiffs "*could only be dispossessed by proceedings in eminent domain.*"

JURISDICTION.

I.

The cause of action below is alleged as follows:

"That your petitioners have a claim against the United States of America under an *implied contract* for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged."

Paragraph 2, Pet., p. 2, fol. 3.

The fourth paragraph of complaint alleges that "the "Government of the United States, in the exercise of its "power of eminent domain under the Constitution of the "United States and by authority of the acts of Congress duly "empowering its officers and agents thereto, &c., did erect "the dams, &c., in Savannah river."

After alleging the permanent destruction of the lands by the superinduced addition of water actually invading the rice plantation, in paragraph 6 of complaint, the seventh allegation is:

"That the said acts of the United States have been done "and are being done *lawfully* by the officers and agents of "the United States under the authority of the United States "in the exercise of its powers of eminent domain and regu-"lation of commerce under the Constitution of the United "States" * * * "for the public use, purpose and ben-"efit of commerce."

The eighth paragraph of complaint alleges "there is due and owing unto plaintiffs by the United States for the * * * *taking* by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation,

for public uses and purposes, $10,000.00, the value of and lawful compensation for such property so taken."

The court below said:

"The object of the proceeding is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action is on the *implied contract* arising from such alleged taking to give just compensation therefor under the fifth amendment" (p. 6, fol. 14).

It appears, therefore, that the complaint below was in express terms an action on an *implied contract;* and was "founded on the Constitution of the United States," and for both of these reasons was a cause of action within the jurisdiction of the court below. It appears, moreover, that the court below held that "the cause of action is on an implied contract."

There is no error assigned in this record against the opinion of the court below that "the cause of action is on an implied contract."

There is no question made in the assignments of error that the court below erred in holding that this cause of action is on an implied contract, and the decision of the court below that the facts alleged constituted an implied contract cannot, therefore, be reviewed here.

The act conferring jurisdiction is as follows:

"First. All claims founded upon the *Constitution* of the United States or any law of Congress, except for pensions, *or* upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, *or* for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the

United States either in a court of law, equity, or admiralty if the United States were suable."

Vol. 24, Revised Stat. U. S., page 505 (March 3, 1887).

"SEC. 2. Circuit court has concurrent jurisdiction in all cases where claim exceeds $1,000 and does not exceed $10,000."

II.

If the question were an original question here, the conclusion would be this is a suit on an implied contract, founded on the fifth amendment of the Constitution.

In this case the plaintiffs allege that the erection of the dam and the said acts of the Government of the United States, as aforesaid, have been done and are being done *lawfully* by the officers and agents of the United States *under the authority of the United States* in the exercise of its powers of *eminent domain* and *regulation of commerce* under the Constitution of the United States and the laws of Congress for the improvement of Savannah river for the public benefit of commerce, see paragraph 7, page 6, Transcript Lynah case.

And the seventh finding of the court below in the Lynah case was: "For several years last past and at the present time the Government of the United States, under its proper officers, *authorized thereto by act of Congress*, have been engaged in the improvement of the navigation of the Savannah river, a navigable water of the United States, this improvement being carried on by virtue of the provisions of section 8, article I, of the Constitution, giving to Congress the power to regulate commerce."

Finding eighth. "In thus improving the navigation of this navigable water *the United States has built and maintained* and is now building and maintaining the dams, training walls, and other obstructions which have caused the Savannah river to flow back, and have resulted in the destruction

of the plantations and the actual and practical ouster of plaintiffs' possession."

Finding eleventh of fact: "The court further finds that the backing up of the water and the invasion of these lands by the superinduced addition of water *was rendered necessary by the execution of the Government's plans.*"

It was such permanent flooding that this court said in Mugler *vs.* Kansas, 123 U. S., 668, "that his property was in effect required to be devoted to the use of the public."

The court below also said in the fifth conclusion of law, Lynah case: "The Government does not in a sense take this land for the purpose of putting its obstructions on it, but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished," and in finding seventh of law the court again says:

"The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose, the water in the Savannah river has been raised at the plaintiff's plantation and remains on it."

In *93 U. S., 4, 13, 14,* this court said of these improvements of the Savannah river, which at that time were begun as a policy of the Government:

"The mode of improving the harbor was left to the discretion of the Secretary of War, and the mode adopted under his supervision constantly tends to the improvement contemplated."

The following acts of Congress appropriate money "to "be expended under the direction of the Secretary of War "for the construction, etc., of public works," and, among others named, improvement of the harbor of Savannah:

24th vol. Stat., pp. 310, 313.

Continuing improvement of harbor of Savannah, $150,000.
25th vol. Stat., pp. 400, 404; 1889.
26th vol. Stat., pp. 426, 431; 1890.
27th vol. Stat., p. 603, 1893; $1,000,000.
28th vol. Stat., p. 341; 1894.
29th vol. Stat., pp. 202, 208; 1895.
30th vol. Stat., p. 44, $1,000,000, 1897.

This action was brought in 1897.

In all these appropriations the matter was remitted to the *discretion* of the Secretary of War to determine the plan and method of improvements.

By act April 24, 1888, 25 vol. Stat., p. 94—*an act to facilitate the prosecution of works projected for the improvement of rivers and harbors*—the Secretary of War is authorized to proceed by condemnation to acquire "any land or right of "way needed to enable him to maintain, operate, or pros-"ecute work for the improvement of rivers and harbors, "for which provision has been made by law," or to purchase same.

This act shows that the Congress of the United States in these improvements did not mean to override the Constitution and fifth amendment and take arbitrarily, but provided for condemnation and payment for any lands needed.

This was the exact relation of the Secretary of War, with a power of condemnation in the improvement, to the parties in case of 112 U. S., Great Falls Manufacturing Company, in which this court say that, without waiting for such formal condemnation proceedings, the claimants could waive same and come into the Court of Claims for compensation.

By reference to the river and harbor act in these successive years, it will be found that the appropriations for the improvement of the harbor of Savannah, above which this plantation is situated, were continuously and successively committed to the discretion of the Secretary of War, so that it appears by the actual findings of the court below that all of

these acts done, whereby this plantation has been taken within the constitutional meaning of the word taken in the fifth amendment, have been done *directly by the Government of the United States, under the authority of acts of Congress vesting a discretion in the Secretary of War*, and therefore that these acts whereby this plantation was taken were the authorized acts of government necessary to accomplish its purpose, and were in no sense the unauthorized acts of public officers, and in no sense a tort. It was the Government itself, through its highest representative, acting as it alone could act to accomplish a declared statutory purpose under the discretion of the Secretary of War. It is in fact and in law the act of the sovereign, and in so acting the sovereign, as an incident to the power under which it acts, proceeds under the limitation of the fifth amendment, which implies the obligation to pay for what it has lawfully taken in the exercise of its supreme power.

III.

IMPLIED CONTRACT ON THE PART OF THE GOVERNMENT TO PAY COMPENSATION WHERE THE GOVERNMENT TAKES PRIVATE PROPERTY.

This court has always held since the Pumpelly case, in 15th Wall., "that the backing of water so as to overflow the "lands of an individual, or any other superinduced addition "of water, *if done under statutes authorizing it for the public* "*benefit*, is such a taking as by the constitutional provision "*demands compensation*."

Pumpelly vs. The Green Bay Company, 13 Wall., 166, rubric 6.

In the Pumpelly case this court cites with approval the language of the New Jersey supreme court, as follows:

"That this power to take private property reaches back of all constitutional provisions and it seems to have been a

settled principle of universal law that the *right to compensation* is an *incident* of the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as *one and the same principle.*"

13 Wall., pp. 178–'9.

In *Mugler vs. Kansas*, 123 U. S., 667, 668, this court said of the Pumpelly case as follows:

"It was a case in which a *permanent flooding* of private property, a physical invasion of the real estate of the private owner and a practical ouster of his possession. *His property was in effect required to be devoted to the use of the public*, and consequently he *was entitled to compensation.*"

In Scranton *vs.* Wheeler, 179 U. S., 153, 154, this court said:

"Undoubtedly *compensation must be made* or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th amendment of the Constitution and of course in its exercise of power to regulate commerce, Congress may not override the provision that *just compensation must be made* when private property is taken for public use."

In The United States *vs.* Jones, 100 U. S., 513, this court says:

"The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain."

In Kaukauna Water Power Company *vs.* The Green Bay and Mississippi Canal Company, 142 U. S., 254–'5, this court said:

"So far as land is *actually taken* for the purpose of this improvement, either for the dam itself or for the embankment, *or for the overflow*, or so far as water was diverted from its natural course or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is *undoubtedly entitled to compensation*" (p. 276).

"The only authority by which private property could be taken or overflowed was one derived from the State or General Government; whatever appropriation was made or injury done to such lands was done solely for the *benefit of the public and it was right the public should pay the compensation therefor*" (p. 278).

"Question of compensation is one separate and apart from the transfers of which this property was subject, but one which *in honor as well as in law was chargeable upon the public.*"

In United States *vs.* Monongahela Company, 148 U. S., 312, this court said:

"But, like other powers granted to Congress by the Constitution, the power to limit commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to *take private property*, then it must proceed subject to the limitation imposed by this fifth amendment *and can take only on payment of just compensation.*"

And in the same case this court again said of the franchise of the company destroyed by the Government:

"The franchise is a vested right. The State has power to grant it, as it may take other private property for public uses *upon the payment of just compensation.* A like, though a superior, power exists in the National Government. It may

take it for public purposes, and take it even against the will of the State, but it can no more take the franchise which the State has given than it can any private property belonging to an individual" (p. 341, *idem*).

"The Government takes it away from the company, whatever use it may make of it, and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken" (p. 343, *idem*).

In this case the value of these rice lands to the Government for holding the overflow, above dams, as a necessary means of accomplishing its purpose of improving the harbor of Savannah, and without which lands it could not accomplish its purpose, is of incalculable riches, for by it as a means it has vastly increased the commerce of the port of Savannah, and already added millions to its customs and over a hundred millions annually to the trade of that port, as the statistics show. It is not a case of pure destruction save to the owner. Flooded for public use, it serves a vaster and more lucrative public end and purpose than it ever did as private property.

In *United States vs. Great Falls Mfg. Co.*, 112 U. S., this court say:

"By *what authority have they appropriated to public use the property of the claimant?* The answer to this question will determine whether the present demand of the claimant arises out of an *implied contract*, and therefore *enforceable by suit against* the United States in the Court of Claims.

"It seems clear that these property rights have been held and used by the agents of the United States, under the *sanction of legislative enactments by Congress;* for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches

of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The *making of the improvements necessarily involves the taking of the property; and* if, for the want of formal proceedings *for its condemnation to public use*, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the *claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation* (Kohl *vs.* United States, 91 U. S., 367, 374). In that view, we are of *opinion that the United States, having by its agents, proceeding under the authority of an act of Congress,* taken the property of the claimant for public use, are *under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title,* is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of *implied contract*, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'

"Having abandoned the proceedings of condemnations, the proper officers of the Government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's island, *the doing of which necessarily involved the occupation and use of the property* as contemplated in what was called the fourth plan for bringing water from the

Great Falls to Washington and Georgetown. In such a case it is difficult to perceive why the legal obligation of the United States to pay for what was thus *taken pursuant to an act of Congress* is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it *by asserting as is done in the petition in this case, that the Government took the property for the public uses designated,* we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation.

"In reference to the title which the Government will acquire as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the arbitrators a valid title to the lands in question. It does not appear that the company has ever parted with that title; and the finding is that no title except that of the claimant is asserted."

United States vs. Great Falls Mfg. Co., 112 U. S., 645–659.

In this record it appears that in their answer the Government of the United States never asserted title in these lands in themselves, but simply put plaintiffs on proof of their title, which the court below finds to be absolute fee-simple in plaintiffs in the lands in question. (See answer, p. 5, Lynah case.) Again it appears by the petition and complaint that the plaintiffs assert that the Government took the property for the public uses assigned" (paragraph 7, complaint, p. 3, Lynah case). Again the court below finds as fact that the "taking" of these lands by backing up of the water was "rendered necessary by the execution of the Government's plans" (fol. 18, p. 8, Transcript Lynah case.)

Every element therefore appears in this case which appeared in the Great Falls Mfg. Co. case, in which the judgment was against the United States.

In Great Falls Mfg. Co. case, 124 U. S., the court say:

"Much stress seems to be laid upon the allegation in the bill—which the appellant insists must be taken as true—that the Secretary of War, by his servants and agents, took possession of lands of the plaintiff, which are 'not within any description made, surveyed, or traced' by him, and has used the same for the purpose of constructing the proposed dam across Conn's island and to the Virginia shore. As the act of Congress provided that the Secretary of War, upon the publication by the Attorney General of the required notice, 'may take possession of the premises embraced in the survey and map,' it is contended that his possession of the company's land and water rights is without authority of law, and constitutes a mere *trespass;* in which case, it is argued, the United States are not legally bound to make compensation to the plaintiff." * * * "So that if the Secretary of War, who was invested with large discretion in determining what land was actually required to accomplish in the best manner the object Congress had in view, found it necessary to take, and has taken and used, and still holds lands of the plaintiff for the proposed dam, which happen not to be covered by the survey and map, the United States are as much bound to make just compensation therefor as if such lands had been actually embraced in that survey and map.

"Of course, we are not to be understood as saying that the Secretary of War could, by any act of his, bind the United States to pay for lands taken by him which, manifestly, had no substantial connection with the construction of the dam across Conn's island to the Virginia shore. It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not

honestly and reasonably exercise the *discretion* with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property-right taken, used, and held by him for the purposes indicated in the act of Congress, whether *it is embraced or described in said survey or map*, or not (*United States vs. Great Falls Manufacturing Co.*, 112 U. S., 645, 656)."

"In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under the act of 1882, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, *in strict law, justify the former in taking possession of the land and water rights* in question, *it was competent for the company to waive the tort, and proceed against the United States*, as upon an *implied contract*, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

Great Falls Man. Co. vs. Att'y Gen., 124 U. S.

The record here shows and the court below finds as a fact that this flooding is permanent, and the land so taken and "required to be devoted to the public use" for holding the waters backed up is necessary to the execution of the Government plan, and the United States still continues to use and proposes to permanently use it for such purpose, and this is for the great public benefit and enrichment of the commerce of the country.

Again this court say :

"The right of eminent domain always was a right at "common law."

Kohl vs. 91 *U. S.*, 376.

"The right of eminent domain was one of those means "well known when the Constitution was adopted, and em- "ployed to obtain lands for public uses." * * * "The "fifth amendment contains a provision that private prop- "erty shall not be taken for public use without just com- "pensation. What is that but an *implied assertion* that *on* "*making just compensation*, it may be taken."

Idem, 373.

And, when so taken, the bill of rights in this fifth amendment, which "is a covenant between the Government and every citizen whose property is appropriated by it for public use" (155 U. S. 177), implies that the Government will pay the compensation, which is the only way the Government of the United States can take private property without overriding the Constitution.

The obligation that the law imposes raises an implied contract.

In *Steamship Co. vs. Joliffe*, 2 Wall., 450, 457 :

Where a pilot tendered his service under compulsory pilotage which was declined and sued on implied contract this court said: "The transaction in this latter case between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that *large class* of transactions designated in the law as *implied contracts* the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party

obtain the money of another by mistake it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests on all persons. In such case the party makes no promise on the subject, but the law 'consulting the interests of morality' implies one, and the liability then arising is said to be a liability upon an implied contract" (citing 16 Cal., 282; Maine, Ancient Law).

Of contracts, Parsons says:

"Far more frequently they are not expressed at all, and for their definition and extent we must look to the common principles, which all are supposed to understand and acknowledge. In this sense *contract* is co-ordinate and commensurate with *duty;* and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide, though far from universal application, that whatsoever it is certain a man ought to do, that the law supposes him to have promised to do."

"Implied contracts," says Blackstone (vol. II. p. 443) "are "such as reason and justice dictate, and which, therefore, "the law presumes that every man undertakes to perform."

Parsons on Contracts, vol. I, p. 5.

"Contracts implied in law are legal fictions adopted for the purpose of enforcing legal duties by actions *ex contractu*, where no actual contract exists, either express or implied. In the case of a contract implied in law, the *intention* is disregarded."

Vol. 15, p. 1078, Eng. and Am. Ency. of Law, and cases cited.

"Wherever the defendant has converted the property of the owner to his own use, the owner may either disaffirm his act and treat him as a wrong-doer or sue for trespass, etc., or affirm his acts and sue in assumpsit."

Cooley on Torts, p. 109.

"In the English law the above terms ('*quasi* contracts') do not occur; there the obligation is said to arise out of a contract or promise *which the law implies*."

2d vol. Austin, Jurisprudence, 5th ed., p. 912.

In the case at bar the law—the highest law—the Constitution itself, in the fifth amendment, implies the contract or promise to pay for private property taken for public use.

That it has been established as a principle in the English law that "*indebitatus assumpsit* lies where the duty is to pay money," see vol. 2, Harvard Law Review, "*The History of Assumpsit*," pp. 64, 65, 66.

There can be no higher duty, no more binding principle of public morality and national honor, than the charter compact of the Government with its citizen in the fifth amendment in protection of his private property to pay money therefor as compensation when taken for a public use. This is always an *implied contract*, for which assumpsit lies.

The case at bar is to be distinguished from the cases where the United States has been sued in tort for *unauthorized* acts of its officers.

"But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the *unauthorized acts* of its officers, these acts being in themselves torts. No government has ever held itself liable to individuals for the *misfeasance*, laches, or *unauthorized* exercise of power by its officers and agents."

Gillam vs. U. S., 8 Wall., 274.

Again:

"The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for *unauthorized wrongs* inflicted by their officers on the citizens

though occurring while engaged in the discharge of official duty."

Langford *vs.* U. S., 101 U. S., 346.

The distinction between *authorized* acts of those officers, acting under lawful authority and doing acts which imply contracts, and the *unauthorized* acts of officials as torts is put by this court very clearly:

"While Congress might be willing to subject the Govern-
"ment to the judicial enforcement of valid contracts, which
"could only be valid as against the United States when made
"by some officer of the Government acting under lawful au-
"thority, with power vested in him to make such contracts,
"or to *do acts which implied them*, the very essence of a tort
"is that it is an *unlawful act*, done in violation of the legal
"rights of some one."

Langford vs. United States, 101 U. S., 345.

Again:

"That this action is one sounding in tort is clear. It is in form one to recover *damages*. The petition charges a *wrongful* appropriation by the Government, against the protest of the claimants, and prays to recover the *damages* done by such *wrong*. * * * If it be said that a party may sometimes waive a tort and sue in assumpsit, as on an implied promise, it is technically a sufficient reply that these claimants have not done so. They have not counted on any promise, either express or implied. But we do not care to rest our decision upon the mere form of action. The transaction, as stated in the petition and as disclosed by the findings of the court, was a tort, pure and simple.'

Schillinger vs. U. S., 155 U. S., 169.

"Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the *wrongful* proceedings of an officer of the Government."

Id., p. 168.

If this were a tort we could waive the tort and sue on implied contract. In contradistinction from these cases of tort, however, the petition of the plaintiffs alleges, the findings of fact by the court below establish, and the acts of Congress cited authorizing these improvements show, that the Government itself, in and by the discretion confided in the Secretary of War, having under the statutes also a power to acquire any needed land by condemnation proceedings and purchase and in and by authorized officers carrying out the plans of the Government in its exercise of the power to regulate commerce, and under the power of eminent domain, took these lands in which they asserted no title, by permanent flooding, rendered necessary in the execution of the Government plan, and without which the statutory and declared purpose of the Government could not be accomplished. This taking by the Government itself, lawfully proceeding in the exercise of supreme power under the Constitution to regulate commerce, implies the promise, raised by the fifth amendment, within the decided limitation of its power to regulate commerce, that it will pay just compensation for the private property it has itself taken.

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